**MURTHE KALIAPAN & ANOR** A

**v.**

**MOHD FAIZAL BABA & ANOR**

HIGH COURT MALAYA, IPOH B
AHMAD NASFY YASIN JC
[CIVIL APPEAL NO: 12B-115-09-2012]
21 AUGUST 2013

***TORT:*** *Damages - Road accident - Personal injury - Collision between motorcar and motorbike - Paraplegia of the lower limb - Plaintiff wheelchair bound for life - Whether award for general damages and special damages fair and reasonable - Whether award for nursing care allowed - Computation - Whether defendant 100% liable for road accident* C

On 12 May 2009, the first plaintiff was riding a motorbike ('the motorbike') with the second plaintiff as a pillion rider. When the plaintiffs were at the vicinity of Taman Melati, a motorcar ('the motorcar') driven by the first defendant collided into the motorbike. The defendant contended that the motorbike had made a sudden exit from a junction ('the junction') and caused a collision with the motorcar. The defendants had also filed a counterclaim against the first plaintiff and sought an indemnity from the first plaintiff against damages that they would have to bear against the second plaintiff. The investigating officer ('SP1') who visited the scene of the accident prepared a sketch plan. From the sketch plan, the long line brake mark indicated a probable excessive speed from the defendant's motorcar. In consideration of the circumstances, the learned Sessions Court Judge ('SCJ') held that the first defendant was 100% liable. As a result of the accident, the second plaintiff had suffered paraplegia of the lower limb with incontinence of urine and faeces and loss of sensation below the umbilicus. The evidence of the medical specialist showed that the spinal-cord injury which resulted in paralysis of both lower limbs had not recovered. There was also no evidence to suggest that recovery was feasible. Therefore, the paralysis had to be taken as a permanent injury. The second plaintiff's life would be a wheel chair dependent life. The SCJ awarded RM300,000 as global award for the injuries sustained. In respect of special damages *ie,* for nursing care, the SCJ awarded RM14,700 as pre trial damages calculated on the basis of RM350 x 42 months and the post trial damages were calculated in two parts *ie,* (i) part 1 - RM700 x 240 months = RM168,000; and part 2 - RM900 x 372 months = RM334,800. Aggrieved, the defendants appealed against the decision of the SCJ. D E F G H I

**Held (allowing appeal against liability and quantum in part with costs):**

**(1)** Based on the evidence of the investigating officer and sketch plan, the road was a straight road and there was no obstacle to obstruct a driver's front view. If the first defendant had exercised caution, he would have noticed the presence of the motorcycle and could have avoided the collision. However, since the accident occurred when the first plaintiff had come out from the junction after a short period of time, the first plaintiff also contributed to the accident. (para 9)

**(2)** In running down cases, the advantages enjoyed by the trial court of having seen and heard the witnesses was not the one and only factor that determines the outcome of the decision. In fact, in most personal injury cases, the evidence of the witness must be tested with other important evidence such as the sketch plan and keys, the marks on the roads as well as the damage to the vehicles involved in the accident. Thus, in personal injury cases, the court sitting in an appellate capacity is not deprived of any advantages that the trial court had had. This was an appropriate case where the decision of the SCJ ought to be reversed and substituted with a finding of liability of 70:30 respectively in favour of the plaintiffs. The findings made by the SCJ were not consistent with the evidence. (paras 11 & 12)

**(3)** Having considered the specialist reports, the sum of RM200,000 as global award for these injuries was fair and reasonable. Since the life expectancy of females in Malaysia was 76.4 years with 1/3 deduction for contingency, the life span of the second plaintiff was 612 months. The second plaintiff would be a wheelchair-bound person throughout her life. This would necessitate a helper to assist her to carry out activities of her daily living. Thus, having considered the current negotiated rate of foreign maid, the monthly wages for a helper would be around RM750 to RM900 per month. The learned SCJ had correctly divided 612 months into two parts. However, the figure awarded for the remaining 372 months in part 2 was on the high side. The more appropriate figure was RM750 x 372 months which equals to RM279,000. (paras 17, 22 & 23)

**Case(s) referred to:**

*Chai Phin Chong & Anor v. Zainal Abidin Mohd Salleh & Anor [1998] 4 CLJ 833 HC* ***(refd)***

*Izhar bin Ishak v. Cheah Per Nam & Anor (2009) 1 PIR [26]* ***(refd)***

*Kerry v. Carter [1969] 1 WLR 1372* ***(refd)***

*Lee Ewe Teik v. Ariffin Hussain [1990] 2 CLJ 191; [1990] 2 CLJ (Rep) 332 HC* ***(refd)***

*Mary Colete John v. Angel Helen Puspan a/p Pereira & Anor (2004) 6 Mallal's Digest para (1638)* ***(refd)***
*Mohd Amiruddin Kamaruddin & Anor v. Fadzillah bt Abdul & Anor (2008) 1 PIR [35]* ***(refd)***
*Nasib Kaur & Anor v. Cheah Kit & Anor [1967] 1 LNS 111 HC* ***(refd)***
*Thong Hon Fah v. Vikneswaran Thanapalan [2004] 5 CLJ 415 HC* ***(refd)***
*Watt v. Thomas [1947] AC 484* ***(refd)***

*For the appellants - Ramamoorthy Doraisamy (Selvanayagam with him); M/s Ng Chee Kong & Co*
*For the respondents - Renuka Paspanathan; M/s B Mohan Raveen & Partners*

*[Appeal from Sessions Court, Ipoh; Summons No: 53-445-2010]*

*Reported by Sandra Gabriel*

## JUDGMENT

**Ahmad Nasfy Yasin JC:**

### Appeal

**[1]** This is an appeal by the appellants/defendant against the decision of the learned Session Judge ("learned SCJ") given in Ipoh Session Court on 29 August 2012. In this judgment parties will be referred to as they appear in the court below.

### Brief Facts

**[2]** The facts of this case, as in other running down cases, are fairly straight forward. On 12 May 2009 at about 18.30 hours, the first plaintiff was riding a motorbike bearing a registration number AFU 3274 ("the motorbike") with the second plaintiff riding pillion. According to the evidence at trial they were heading to a store. When they were on the road and at the vicinity of Taman Melati, a motorcar, bearing registration number ABT 118, ("the motorcar") that was driven by the first defendant had collided into the said motorbike.

**[3]** According to the plaintiffs as a result of the accident, they suffered severe injuries. Again, as it is normal in running down cases, the plaintiffs put the total blame for cause of the accident on the defendant.

**[4]** The defendants' defence was in the complete opposite of the plaintiffs contention. They denied liability totally. They contended that the said motorbike had made a sudden exit from a junction of the said road ("the junction") and caused a collision with the said motorcar. Hence, the defendants had also filed a counterclaim against the first plaintiff seeking an indemnity for the first plaintiff against damages that they will have to bear against the second plaintiff, if any.

## Decision Of The Learned SCJ

**[5]** The learned SCJ, after full trial and after hearing submissions, held that the defendants are 100% liable. The learned SCJ recorded the following reasons:

(i) The investigating officer (SP1) who visited the scene of the accident has prepared a sketch plan and key (P2-P2K) and took 23 photos (P3a-I). SP1 had concluded from his investigation that the first plaintiff was coming from a left junction in Taman Melati and heading to the top of P2. Whereas the first defendant was travelling from the bottom to the top of P2. SP1 noted that the weather was good and traffic was not busy at that material time, and the road is a straight road with no view obstruction from the bottom to the top.

(ii) SP1 further testified that the road were divided into three lanes ie, lane B-C is for motorbike, C-D and D-E are the main lanes. Another lane E is meant for U-turn. The accident occurred at lane E. The motorcar had left a brake mark (mark G in P2) along lane D-E which measured about 15 meters long (refer P3a, c and d). There were also broken glass splinters from the said motorcar (mark J of P2). All these indicated that the motorcar was probably driven in an excessive speed. Mark H is scratch mark from the said motorbike, indicating that the motorbike had already passed the said junction and already in lane E.

(iii) The first plaintiff testified that he was coming from a left junction and had already passed the lane E, when the collision took place at marked X of P2. It was after he exited the junction the accident occurred.

(iv) The first defendant (SDI) had testified that the first plaintiff motorbike had made a sudden exit from the said junction and obstructed his correct path. He applied his motorcar's brake and swerved to the right but as the motorbike was too close, the accident was inevitable. He claimed that the collision occurred at mark G of P2.

(v) Based on the evidence, it is an inherent possibility that the accident occurred at lane E, which the scratch mark H indicated the possibility that the motorbike was probably knocked down just before it passed lane E. Hence, the defendant's version that the collision occurred at lane D-E is not acceptable. (See *Lee Ewe Teik v. Ariffin Hussain* [1990] 2 CLJ 191; [1990] 2 CLJ (Rep) 332).

(vi) From the sketch plan, the long line brake mark indicated a probable excessive speed from the defendant's motorcar. If he took a proper look out and reduced his speed, this accident could probably be avoided (see *Chai Phin Chong & Anor v. Zainal Abidin Mohd Salleh & Anor* [1998] 4 CLJ 833, *Thong Hon Fah v. Vikneswaran Thanapalan* [2004] 5 CLJ 415 and *Nasib Kaur & Anor v. Cheah Kit & Anor* [1967] 1 LNS 111; [1968] 1 MLJ 58).

(vii) Having taken into consideration the above circumstances, the learned SCJ held that the first defendant was 100% liable.

**Quantum**

**[6]** The appeal against quantum only centres on two items as follows:

(i) General damages:

Paraplegia – lower limb was awarded RM300,000.

(ii) Special damages:

Nursing care:

Pretrial – RM350 x (3 years and 6 month) = RM14,700.

Post trial part 1 – RM700 per month x 240 month = RM168,000.

Post trial part 2 – RM900 per month x 372 month = RM334,800.

**Finding Of This Court**

**[7]** As regard to liability, in my considered view the crux of the issue in this case is whether the plaintiff had made a sudden exit from the junction of Taman Melati and caused the accident.

**[8]** I must state that from the facts as reflected in the of appeal the following evidence by the plaintiff was not challenged:

(i) "Selepas saya keluar dari simpang lebih kurang 30 saat kemalangan berlaku" (at p. 51 of the record).

(ii) When replying to the question in examination-in-chief in which part of the plaintiff's motorcycle the defendant's car collided with he said "dari arah belakang" (at p. 161 of the record).

I am of the view that in the circumstances it is reasonable to infer that the motorbike had shortly passed the junction and was at lane D-E and not as what the defendants had claimed. At the same time the motorcar driven by the first defendant who was travelling from the bottom to the

top of P2 at lane D-E was probably driven in an excessive speed has collided into the motorcycle. This inference is consistent with and supported by the brake mark, G, which measures 15 meters in length.

**[9]** Based on the evidence of investigating officer and sketch plan, the said road is a straight road and no obstacle to obstruct a driver's front view. That being the case, under normal circumstances and if the first defendant had exercised caution he would and should have noticed the presence of the motorcycle at lane D-E and could have avoided the collision. However given that the accident occurred "lebih kurang 30 saat" after the first plaintiff had come out from the junction a short period of time, I am of the view that the first plaintiff also contributed to the accident.

**[10]** At this juncture it is appropriate for me to state that an appellate court will be slow in disturbing the findings made by a trial court. There are plethoras of authorities on this point. Suffice for me to refer to the case of *Watt v. Thomas* [1947] AC 484, a case that sets out the role of the appellate court. Lord Thankerton in that case stated as follows:

> I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied there in is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.

**[11]** In my considered view in running down cases the advantages enjoyed by the trial court of having seen and heard then witnesses is not the one and only factor that determines the outcome of the decision. Put it differently, running down cases do not fall within a class of cases whereby, to quote Lord Thankerton, "a class in which it is generally most important to see and hear the witnesses". In fact in most personal injury cases the evidence of the witness must be tested with the other important evidence such as the sketch plan and keys, the marks on the

roads as well as the damage to the vehicles involved in the accident. Thus in personal injury cases the court sitting in an appellate capacity, is not deprived of any advantages that the trial court had had. Support for this view could be found in the case of *Kerry v. Carter* [1969] 1 WLR 1372 where Lord Denning had occasion to say:

> We have been referred to cases on this subject, particularly the recent case of *Brown v. Thompson* [1968] 1 WLR 1003. Since that case it seems to have been assumed in some quarters that this court will rarely, if ever, alter an apportionment made by the judge. Such is a misreading of that case. I think that the attitude of this court was correctly stated in that case, at p. 1012, by Edmund Davies LJ when he quoted from the judgment of Sellers LJ in *Quintas v. National Smelting Board* [1961] 1 WLR 401, 409. *This court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts: but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a Court of Appeal. We are here to put right that which has gone wrong. If we think that the judge below was wrong, then we ought to say so, and alter the apportionment accordingly.*
>
> (emphasis added)

**[12]** Having addressed myself of the principles that I had stated above, I am of the considered view that this is an appropriate case where I ought to reverse the decision of the learned SCJ and substituted it with a finding of liability of 70:30 respectively in favour of the plaintiffs as the findings made by the learned SCJ are not consistent with the evidence. I so order.

**Quantum**

**[13]** As regards to quantum, it is not in dispute that the second plaintiff has suffered the following injuries:

(i) Paraplegia (unable to move the lower limbs) with incontinence of urine and faeces; and

(ii) Loss of sensation below the umbilicus.

**[14]** There are two specialist reports as follows:

(i) The plaintiffs' specialist – Dr John Anantham; and

(ii) The defendants' specialist – Dr Siva.

**[15]** The evidence of these specialists can best be summarised as follows. The spinal cord injury which resulted in paralysis of both lower limbs has not recovered. There is no evidence to suggest that recovery

is feasible. This finding made 121 months after the injury to the spine is important. Given this finding, the paralysis, has to be taken as a permanent injury. Clinically there is upper motor-neuron injury type of paraplegia, she has an autonomous bladder and bowel control. There is however no voluntary control of the lower limbs. There will be involuntary muscle spasms and tremors when the limbs are irritated or stimulated. There is truncal weakness as shown by her tilt to the right when she sits. The second plaintiff life will be a wheel chair dependent life. Prolonged sitting may cause discomfort due to the truncal weakness. As she grows older she will have to be trained to be able to transfer herself in and out of the wheel chair. There will be some problems here due to the tendency of the lower limbs to go into involuntary spasms.

**[16]** The learned SCJ awarded RM300,000 global despite the fact he referred to cases which has awarded for less in accordance with the trends of awards such as *Mary Colete John v. Angel Helen Puspan a/p Pereira & Anor* (2004) 6 Mallal's Digest para (1638) where RM180,000 was awarded; *Mohd Amiruddin bin Kamaruddin & Anor v. Fadzillah bt Abdul & Anor* (2008) 1 PIR [35] where RM160,000 was awarded; and *Izhar bin Ishak v. Cheah Per Nam & Anor* (2009) 1 PIR [26] where RM240,000 was awarded.

**[17]** Having considered the two specialist reports and decided cases above, I am of the view that the sum of RM200,000 global awards for these injuries is fair and reasonable.

**[18]** In respect of special damages ie, for nursing care, the learned SCJ awarded as follows:

(a) Pre-trial damages of RM14,700; (calculated on the basis of RM350 x 42 months); and

(b) Post-trial:

- Part 1 – RM700 x 240 month = RM168,000; and

- Part 2 – RM900 x 372 month = RM334,800.

**[19]** On appeal, I agreed with the appellant's counsel submission and subsequently reduced the amount of post-trial award for part 2 being the sum of RM279,000 (calculated on the basis of RM750 per month x 372 months).

**[20]** In this case it is to be recalled that the evidence of the specialist doctors showed that the second plaintiff's upper limbs are normal and evidence shows she can be independent for part of her daily activities as stated at p. 132 of record of appeal (exh. P15) which in turn contained the following facts:

- She is able to eat independently;
- When she is older, she would probably be able to shower herself while being seated on a shower commode;
- She would be able to groom herself;
- When she is older, she may be able to dress and undress independently *albeit* with some difficulty;
- When she is older, she may be able to self administer enemas;
- With proper training in adult life she may be able to independently transfer herself from bed to chair and *vice versa*; and
- When she is older and with proper training, she will probably be able to use a wheelchair independently.

**[21]** Quite clearly the evidence shows that the second plaintiff's need for nursing care throughout her life although, as stated above, with proper training, she may be able to do certain things independently. In this regard I am in agreement with the learned SCJ's finding that based on exh. P15, it appeared that the second plaintiff's health and condition is actually not bad as it seems. She may lead a quite independent life, provided she is given a proper training.

**[22]** In relation to that as well it is pertinent to state that the average life expectancy of females in Malaysia is 76.4 years. Taking into consideration of 1/3 deduction for contingency, I am of the view that the life span of the second plaintiff is 612 months. The second plaintiff, as alluded earlier, will be a wheelchair-bound person throughout her life. This would necessitate a helper to assist her to carry out activities of her daily living. That being the case and having considered the current negotiated rate of foreign maid it is reasonable to say that the monthly wages for a helper will be around RM750 to RM900 per month.

**[23]** The learned SCJ had divided 612 months into two parts which I agreed. However the figure awarded for the remaining 372 months in part 2 to my mind is on the high side. In my view the more appropriate figure is RM750 x 372 months which equals to RM279,000. I so order.

**Conclusion**

**[24]** Based on the reasons adumbrated above I allowed the appeal against liability and quantum, in part as clarified above, with costs.